No. 18226

United States Court of Appeals

FOR THE NINTH CIRCUIT

MORTON K. LANGE,

Appellant & Cross-Appellee,

vs.

LIBERTY NATIONAL INSURANCE COMPANY,

Appellee & Cross-Appellant.

BRIEF OF APPELLEE AND CROSS-APPELLANT

On Appell from the District Court of the United States for the District of Idaho, Northern Division

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Residence: Coeur d'Alene, Idaho.
Counsel for Appellee & Cross-Appellant.

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TABLE OF CASES CITED

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Statement of Jurisdiction.

We agree with the appellant's statement of the jurisdiction of the District Court and this Court. As stated in the pre-trial order, this is a suit between a citizen and resident of Missouri, the plaintiff, and an Idaho corporation, the defendant, where the amount in controversy exceeds the sum of $10,000.00 exclusive of interest and costs.

The suit was originally commenced in the Circuit Court of the City of St. Louis, State of Missouri, jurisdiction being based on an attachment and garnishment levied against the Transatlantic Casualty Underwriters, Inc., a corporation of the State of Missouri, Eastern Division, on ground of diversity of citizenship. Thereafter upon defendant's application the venue was ordered changed on the United States District Court for the District of Idaho, Northern Division, the district of defendant's residence.

STATEMENT OF CASE

Since the appellant, Morton K. Lange, has in his brief, referred to the parties as plaintiff and defendant, this appellee and cross-appellant will do likewise for reasons of consistency and clarity.

Plaintiff's statement of the case consists principally of his summation of what is contained in the respective pleadings of the parties, which this defendant submits is not wholly accurate and of a misleading statement of the evidence. Consequently, defendant deems it necessary in order for this court to obtain a clear picture of this litigation to enlarge said statement by setting forth the material and undisputed facts of the controversy, all as reflected by the pre-trial order herein or the transcript of the evidence, as follows:

That the plaintiff, an attorney, as the result of his military and civilian employment in Germany following the war, saw an opportunity to write automobile public-liability insurance for American servicemen there and in pursuance thereof, did learn of and negotiate a general agency agreement for that purpose with the defendant, a small Idaho insurance corporation, with its' principal office at Coeur d'-Alene, Idaho (Tr. pp. 3-10, Ex. 3 & 4). The result was that a managing general agency agreement was entered into on September 1, 1955, between defendant Company and Transatlantic Casualty Underwriters, Inc., a Missouri corporation that the plaintiff formed for the purpose of doing such agency business (Tr. pp. 10, 143, 145). Said agency agreement provided, amoung other things, for agents' commission of 30% or more, that it was determinable by either party

upon notice and that all premiums collected were property of the defendant and commissions to the agent thereon merely debts of defendant (Ex. 1). In the Fall of 1956, defendant sought to reduce the commission to 20% on the grounds that the losses on the Germany business were high and the business therefor unprofitable for defendant. (Tr. pp. 24-26, 148-149, 296, 259, Ex. 8).

That due to its impaired capital condition (Ex. 10) the defendant's operations were taken over on Sept. 24, 1956, by the State of Idaho Insurance Department, pursuant to an order duly entered on said date by the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai in the matter of the rehabilitation of defendant, and which order enjoined the officers and directors of defendant from taking any action with respect to defendant's affairs except with written permission of the Rehabilitator. (PTO p. 18, Ex. 14). Mr. B. J. Albertson took active charge of defendant's operation as Deputy Rehabilitator under the Idaho Insurance Commissioner (Tr. pp. 322-323, P. T. O. p. 17). That at a meeting on December 10, 1956, the then stockholders of defendant passed a resolution reducing the par value of defendant's stock from $100.00 to $5.00 and thereby increasing their outstanding stock from 3,000 shares to 60,000 and further turning the same over to the Rehabilitator for the sale, under a plan then adopted, of not more than 36,000 of said shares at $7.75 per share on or before January 2, 1957, the proceeds of which were to be donated to the defendant's treasury, and the unsold balance of said stock, after allowing the old stockholders for their interest one share for every nine

sold, to become treasury stock of defendant. Mr. J. Henry Bell, of Coeur d'Alene, Idaho was appointed to act as trustee for the stockholders in the sale of such stock (P. T. O. pp. 18-19, Ex. 11).

That upon learning that defendant was in rehabilitation, the plaintiff hastened to Coeur d'Alene from Germany, arriving on December 12, 1956, and remained there until the 22nd when he left for Minneapolis, and just prior to leaving he gave Mr. Albertson a check in the amount of $50,000.00 payable to said trustee and also a promissory note for another like amount, due in February of 1957, also payable to said trustee, pursuant to said contemplated refinancing arrangement (P. T. O. 19, tr. pp. 29-30). Plaintiff returned to Coeur d'Alene on January 2, 1957, at which time negotiations between he and Mr. Albertson resumed (P. T. O. 20, tr. p. 50). Plaintiff was joined in Coeur d'Alene on January 2nd, 1957, by Mr. Luther Smith of St. Louis, his attorney and business associate, who stayed with him until after plaintiff had negotiated for and made his investment in defendant's stock (tr. pp. 278-298). On January 6, 1957, Mr. Albertson informed plaintiff that his said note wasn't acceptable to the Idaho Insurance Department in connection with the financing proposal then being considered; that next day plaintiff presented Mr. Albertson with a letter (Ex. 13), requesting return of his check and note and advising that he would be willing to subscribe to $50,003.00 worth of defendant's stock under conditions set forth in said letter (P. T. O. p. 20). Then on the next day, January 8, 1957, plaintiff informed Mr. Albertson that he was willing to subscribe the same amount provided the defendant would be operated under the joint control

of its' Board of Directors and the Rehabilitator and provided a satisfactory agency contract for a period not less than one year be given to Transatlantic Casualty Underwriters, Inc. On that day, Mr. Albertson made application to and obtained from the court an order modifying the previous rehabilitation order by providing that the affairs of defendant would be jointly managed by the Rehabilitator and the Board upon filing evidence that the defendant had not less than the statutory paid in capital of $100,000.00. Mr. Albertson agreed with plaintiff to file such evidence as soon as the amount subscribed under the minimum financing proposal had been paid in (P. T. O. pp. 20-21).

At a special meeting of defendant's Board of Directors on January 8, 1957, plaintiff was appointed as a Director to fill one of the vacancies caused by resignation and was at a meeting on the following day, appointed as President of defendant (P. T. O. p. 21).

On or about January 11, 1957, the plaintiff as president of defendant sent out a letter (Ex. 15) to all stock subscribers advising them that a sufficient amount had been subscribed to meet the statory requirement for paid in capital and permit continued operation of defendant, that a change in plans was necessary and that the time for stock subscription had been extended to March 15, 1957, that any subscribers not agreeable thereto could obtain their money back if they requested same not later than January 18, 1957. Waiver of notice was enclosed for the use of subscribers in assenting to said extended time (P. T. O. p. 21, Ex. 15). At the same time, plaintiff also signed a letter to defendant's agent informing

them that the first steps in Rehabilitation has been taken (Ex. 15) and on or about January 14, 1957, plaintiff signed a document setting forth his management recommendations for defendant. (P. T. O. p. 21).

On January 11, 1957, amendment No. 1 to the Managing General Agency Agreement between defendant and Transatlantic Casualty Underwriters, Inc., was executed, providing that the agency commissions be from 27½ to 30%, that the agreement remain in force at least until the end of 1957, granting the agent additional time in which to pay monies over to defendant and authorizing the agent to write insurance in additional countries (P. T. O. pp. 21 & 22, Tr. pp. 209-212, Ex. 1). Thereupon, on said date, plaintiff executed a stock subscription agreement and the waiver aforementioned and gave his check in the amount of $50,000.00 to said trustee (P. T. O. p. 22).

The source of the money upon which said check was drawn was Transatlantic Casualty Underwriters, Inc., which company was then indebted to defendant for premium monies collected but not remitted (Tr. pp. 208 & 209, 321,), although plaintiff previously assured Mr. Albertson that it was his own money (Tr. p. 337).

The plaintiff left Coeur d'Alene for Germany on January 14, 1957, intending to return about March 1st to assume the management of defendant. At the time he left he was given a document by Mr. Albertson (Ex. 17), setting forth conditions to be realized prior to termination of rehabilitation (P. T. O. p. 22, Tr. pp. 214 & 374).

Pursuant to meetings held by the Commissioner of Insurance and Mr. Albertson with officers and employees of defendant to ascertain whether the defendant could survive with the minimum financing then on hand and the consensus being in favor, the Commissioner and his said Deputy decided to accept the same and thereupon the trustee was directed to turn the money in his possession over to defendant, which he did on January 18th and 21st, 1957. Said money was spent by defendant. (P. T. O. p. 22, tr. pp. 340-341).

Plaintiff was informed by Mr. Albertson that the Idaho Attorney General had ruled that the defendant couldn't be released into joint control until the Rehabilitator could "guarantee" to the court that the $100,000.00 capital was unimpaired. No such "guarantee" was ever filed with court and the defendant was never formally released into joint control (P. T. O. pp. 22 & 23).

On or about January 6, 1957, a Mr. Frank Becker and his associates commenced negotiations with Mr. Albertson, which led to a decision on their part in March, 1957, to purchase all the remaining outstanding unsold shares of defendant's stock, provided they could secure the same and thereby obtain a controlling interest. (P. T. O. pp. 23 & 24). The plaintiff communicated with Mr. Becker relative to such purchase and wired him that he wouldn't oppose such sale if the other stockholders favored it (Tr. pp. 84-90, 240-244, Ex. 25).

In the latter part of March, 1957, after the deadline for securing stock subscriptions had expired, the old stock holders who made their stock available for

rehabilitation purposes, determined to take 2,162 shares as their full share and to sell all of the unsold balance of the 60,000 shares, i. e. 38,377 shares for $7.75 per share, all the proceeds to go to defendant and they consummated an agreement for the sale thereof to Mr. Becker and associates, by and with the consent of the Rehabilitator (P. T. O. pp. 24 & 25, Ex. 24).

On or about March 30, 1957, the plaintiff, as President of defendant, executed stock certificates for the stock subscribed by plaintiff and others prior to March 15th, 1957, and sent them to the defendant's Secretary. (P. T. O. p. 25).

On April 5, 1957, a notice was sent to all stockholders of defendant, including plaintiff, advising them of the latest refinancing plan and requesting them to deliver a consent and waiver to defendant. All of the Stockholders delivered such a waiver except plaintiff, although he did sign one (P. T. O. p. 26, tr. p. 244). At the annual meeting of stockholders of defendant on April 15, 1957, the stockholders unanimously approved the stock sale to Mr. Becker and associate and further approved all acts of the Insurance Commissioner and defendant's officers in proceedings under rehabilitation. The plaintiff, who was still President, was given due notice of that meeting but didn't attend (P. T. O. p. 26, Ex. 29, Tr. pp. 95 97).

On May 16, 1957, Mr. Albertson, the acting Rehabilitator, filed with the Idaho District Court, an application for termination of the rehabilitation and on the same day an order was entered fixing the hearing thereon for May 28, 1957 and directing Mr. Al-

bertson to give at least five (5) days notice thereof to all stockholders by mail and publication, which notice was duly given (P. T. O. pp. 27 & 28). At said court hearing, which was wholly unopposed, a Judgment and Order terminating said rehabilitation proceeding was entered (P. T. O. p. 27).

STATEMENT OF DEFENDANT'S CROSS-CLAIM

It is admitted that the Transatlantic Casualty Underwriters, Inc. has collected insurance premiums on behalf of the defendant in Germany which it has refused and still refuses to pay over to the defendant in the amount of $49,297.58. In this action, the defendant cross-claimed against the plaintiff to collect the same, alleging and contending that even though said Missouri corporation is not a party to this action, it is simply the alter ego or instrumentality of the plaintiff to carry on said agency business and that therefore said corporate entity should be disregarded—also that plaintiff while in a position of trust and confidence for the defendant, did cause said premium monies of the defendant to be accumulated and withheld by said Transatlantic Company, so that plaintiff could levy an attachment thereagainst when he intiated this law suit in the Missouri court.

The plaintiff denies the allegations of the cross-claim, and claims that the Transatlantic Company has various off-sets, credits and counter-claims against the defendant, which make said corporation an indispensable party.

The facts are that the plaintiff caused the formation of Transatlantic Casualty Underwriters, Inc., a Missouri corporation, to enter into the general agency

agreement with defendant (Tr. p. 10, 143). Plaintiff at all times owned all of said corporation stock except for one share each owned by his wife and Mr. Luther Smith, and plaintiff was at all times the president and manager thereof (Tr. pp. 145 & 147). Said company represented only the defendant (Tr. p. 147). The plaintiff individually gave a fidelity bond to defendant at the inception of relationship which wasn't renewed after plaintiff became president of defendant (Tr. pp. 144, 362-364). The plaintiff, at his request, was authorized to draw checks against the bank account of defendant in Germany, for the payment of claims (Tr. pp. 22-23, 263).

The $50,000.00 that the plaintiff purchased defendant's stock with was actually money belonging to the Transatlantic Casualty Underwriters, Inc. (Tr. p. 321) which company at the time was indebted to the defendant for premium monies in the amount of approximately $75,000.00 (Tr. pp. 168), that representing most all of its cash on hand and at that time (Tr. p. 260). Plaintiff made such investment in order to save and protect the business of Transatlantic Company and thereby protect himself from criticism, bad publicity and financial loss. (Tr. pp. 160-162, 357).

The evidence shows that plaintiff attempted to largely condition his investment on benefits that would accrue to his Transatlantic company, i. e., a new contract for a minimum term at better commission rates and an extension of time in which to pay premiums collected over to the defendant (Tr. pp. 209-211, Ex. 1 & 13).

The plaintiff caused the Transatlantic Company

to withhold payment of premium monies to defendant for the purpose of accumulating a fund that he could attach in Missouri for jurisdictional reasons in this personal suit against defendant (Tr. pp. 254-255, 360-361). Although such attachment was never supported by plaintiff's bond as required by law and therefore became automatically terminated, said premium monies have never been remitted to the defendant (Tr. pp. 254-255) despite the fact that the agency agreement provides that all premiums are property of defendant and commissions of the agent thereon are merely debts of defendant and the agent guarantees the premium on all policies issued (Ex.1).

The trial court upon findings that the said Transatlantic Casualty Underwriters, Inc., was an entity separate and apart from plaintiff and was not a party to this action, decreed the dismissal of defendant's cross-claim against plaintiff.

SPECIFICATIONS OF ERROR

I.

The trial court erred in finding that the Transatlantic Casualty Underwriters, Inc., a Missouri corporation, is an entity separate and apart from the appellant and cross-appellee, Morton K. Lange, and in concluding therefor that cross-appellants counterclaim against said corporation for an accounting and to recover insurance premium monies admittedly withheld by it should be dismissed, because said corporation is not a party to this action, instead of finding that said corporate entity should be disregarded because it is merely the alter ego of the appellant and cross-appellee Morton K. Lange, and concluding

that cross-appellant is entitled to appropriate equitable relief on its' said counterclaim.

SUMMARY OF ARGUMENT

I.

The findings of the trial court were sufficiently comprehensive and pertinent to the issues to provide a basis for the court's decision and were supported by the evidence—they therefore sufficiently comply with the requirements of Rule 52(a) of the Federal Rules of Civil Procedure.

II.

The findings of the trial court, being supported by substantial evidence and none thereof appearing to be plainly erroneous, will not be overturned on review.

III.

That plaintiff should have made his claim in the State Court, and the judgments of the state court approving the confirming facts all acts of the Rehabilitator and terminating the rehabilitation proceedings is binding and conclusive upon plaintiff. Plaintiff had the express statutory rght to a hearing and had actual notice of such right, so the requirement of procedural due process is satisfied. The plaintiff cannot now challenge that judgment in this court.

IV.

The essential elements of an action for fraud and deceit are not present. The factual matters alleged

to have been misrepresented were not false or known to be false by the party making it, and the other matter alleged to have been misrepresented were not facts. The plaintiff did not, in fact, rely on any representations made by Mr. Albertson or Mr. Chapman, whether true or false.

V.

Plaintiff waived his right to sue for damages or rescind for fraud by reason of his inconsistent conduct and dealings with property after knowledge. Also, as a condition of rescinding, the plaintiff has never offered to, has not and cannot put the defendant in its' former position.

VI

The evidence entitles the defendant to recover from the plaintiff the premium monies in the amount of $49,297.58, admitted to be withheld by the Transatlantic Casualty Underwriters, Inc., on the grounds that said corporation is and was merely the alter ego or business conduit of the plaintiff. The corporate entity should be disregarded under the facts and circumstances.

ARGUMENT

I.

The defendant submits that the trial court's findings of fact states the ultimate relevant facts necessary to support the ultimate conclusions reached by the court, and that such findings are therefore in compliance with Rule 52(a) of the Federal Rules of Civil Procedure.

The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence.

Summerbell v. Elgin Nat. Watch Co. (CADC) 215, F. 2d. 323.

Shapiro v. Rubens (CAA Ind.) 166 F. 2d. 659.
Weber v. McKee (CA Texas) 215 F. 2d. 447.

"Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law."

Petterson Lighterage & Towing Corp, v. New York Central R. Co. (CAA 2d.), 126 F. 2d. 992.

II.

It is the contention of the plaintiff, as presented by his Points on Appeal Nos. II-IX, that the trial court erred in finding from the evidence introduced that plaintiffs subscription monies were turned over to the defendant pursuant to plaintiff's agreement, full knowledge and consent, that no fraud whatever was practiced upon plaintiff for the purpose of inducing his subscription or at all, nor was any agreement made with plaintiff violated by defendant taking and retaining such monies and in further finding inequitable and estoppel producing actions and conduct or ommissions on the part of plaintiff. Defendant submits that each and all of the trial court's findings are supported by substantial, although in some

instances conflicting evidence and that therefore said findings are entitled to be affirmed on this appeal, particularly so, since this is an equity matter.

The substantial and convincing evidence in support of the court's finding is as follows:

That when it developed that a sufficient amount of new financing, satisfactory to the Insurance Commissioner, had not been subscribed by January 2nd, 1957, to meet the minimum financing requirements as originally contemplated, the December 10th, 1956 resolution and stock subscription agreement was necessarily modified (Tr. pp. 336, 339-340, Ex. 15) a few days after January 2nd, 1957, to provide that the minimum financing of approximately $275,000.00 that the original plan contemplated raising by January 2nd, be undertaken in two stages, to-wit: (a) that the financing to provide at least the minimum capital required by law for the Company to continue in business after December 31st, 1956, be immediately accomplished and taken into the Company (Tr. pp. 183-185, 338-340, 354-356, Exs. 15 & 16, and, (b) that the time be extended until March 15th, 1957, from January 2nd for selling the unsold balance of the 36,000 shares, to raise the minimum capital satisfactory to the Commissioner for ending the rehabilitation proceedings (Tr. pp. 339-340).

On or about January 8th, 1957, the plaintiff, as a condition of his later stock subscription, had arranged to have himself appointed to defendant's Board of Directors, and then made President of the defendant, which positions also presumed that he would be a stockholder (Tr. pp. 208, P. T. O. p. 21). Thereafter, on January 11th, 1957, an amendment to

the Agency contract between plaintiff's Transatlantic Casualty Underwriters, Inc., and the defendant, of which plaintiff was then president, was executed (Tr. pp. 209-211) which guaranteed the agency relationship for another year at higher commissions over what defendant felt obliged to reduce them to in October, 1956, extended the time for premium remittance, and authorized the writing of insurance in France, Spain and Italy, but significently omitted any provision for the "green cards and excess limits facilities", which plaintiff, an attorney, contends were of such vital importance (Tr. pp. 209-212, Ex. 1). Thereupon, the plaintiff made his stock subscription for $50,000.00 (P. T. O. pp. 21 & 22, Ex. 16), using for that purpose monies of Transatlantic Company, which company was then indebted to the defendant for more than that amount (Tr. pp. 168, 208-209). He intended to thereby become a stockholder in defendant and did (Tr. p. 207). It was most important to plaintiff that the defendant survive and continue to operate (Tr. pp. 160-162, 207, 357), and he knew that he had to put that amount of money in or the defendant would have been liquidated (Tr. pp. 202-203).

On January 11th also, the plaintiff as President of the defendant, sent out a letter to all subscribers advising them that sufficient subscriptions had then been received to provide the statutory *paid in* capital of $100,000.00 and permit the defendant to continue to operate but that additional financing was necessary and that the original agreement had been modified so as to extend the time for subscriptions to March 15th, 1957, and that present subscribers could obtain their money back if they requested the same

not later than January 18th, 1957 (Ex. 15), and he also on that date sent a letter to defendant's agents advising that the first steps in rehabilitation of defendant had been accomplished and that the impairment of capital had been sufficiently relieved to permit defendant to continue to operate (Ex. 15).

Plaintiff was informed prior to January 18th that the defendant was critically short of cash with which to meet its' normal operating expenses not to mention payment of claims (Tr. pp. 340-341, 355-356).

On January 18th and 21st, 1957, promptly following the expiration of time in which subscribers could obtain their money back pursuant to plaintiff's notice to them of January 11th (Ex. 15), the subscription money then on hand, about $150,000.00 was turned over to the defendant by the trustee at the direction of the Rehabilitator (P. T. O. p. 19, Tr. pp. 339-340). While plaintiff incredably denies that he had knowledge that such was going to happen, he does, however, admit to receiving knowledge on or about February 1st, 1957 that his and the other subscribers' money had gone into the defendant's treasury (Tr. pp. 71-72, Ex. 18, 19, 52).

Contrary to plaintiff's statement on p. 25 of his brief, defendant's answer does not admit that the funds transferred to the defendant were insufficient to meet the requirements of the Commissioner for the continued operation of the company, but rather does admit that funds were transferred to the defendant on or about January 19th, 1957, and further admits that sufficient funds were not raised by the resale of stock by March 15, 1957, to meet the requirements of the Insurance Commissioner to permit the

continued operation of the defendant (P. T. O. p. 5). The funds transferred to the defendant in January, 1957, were not only necessary but sufficient to provide the statutory minimum capital and thereby save defendant from liquidation but to permit its' continued operation and by reason thereof the defendant at all times since has been able to continue operating (Tr. pp. 358-359). The very exhibits cited by plaintiff (Exs. 38, 39, 42 & 46) do show, despite plaintiff's contrary assertions, that the amount of money turned over to defendant did not only make the assets equal to the liabilities as of that time, but did also provide the required minimum capital of $100,000.00 (Tr. pp. 326, 339-340). By the end of March, 1957, however, the defendant's capital was again impaired due to further losses (Tr. pp. 121-122, Exs. 36 & 38), and the amount of additional money raised as of that time was not sufficient to meet the requirements for continued operation (Exs. 20, 21, 22 & 28). It was always recognized by the Rehabilitator and plaintiff was advised that the defendant should have at least $250,000.00 additional financing (Tr. p. 159), the original plan called for raising $279,000.00 (Tr. pp. 44-45, Ex. 11) and $500,000.00 was really needed (Tr. p. 340).

In the month of March, 1957, the plaintiff as president, signed and transmitted to the secretary of defendant the stock certificates representing the stock subscribed by himself as well as the numerous other subscribers through the trustee (P. T. O. p. 25

Tr. p. 358), all of which others presumably understood the circumstances of their investment and have never questioned the same whatever (Tr. p. 25).

An understanding was reached between plaintiff and Mr. Albertson that state court rehabilitation order would be modified to allow for joint management of defendant by the rehabilitator and the board of directors, and an application was made to the court for the purpose (P. T. O. p. 20, Ex. 14). It wasn't accomplished because the Idaho Attorney General informed Mr. Albertson that he would have to guarantee to the court that defendant had unimpaired the capital required by statute as a condition thereof (Ex. 19). It would appear to be very questionable whether the statutory Rehabilitator could lawfully delegate or impair performance of his duties by such an arrangement and as a practical matter, if under joint control there was lack of agreement, the decision of the rehabilitator would doubtless control (Tr. pp. 215-217). Actually, the Board and Mr. Albertson did meet and work together to try and resolve defendant's troubles (Tr. p. 347, Exs. 18, 19 & 20). The plaintiff, who was president and a director of defendant, was, however, absent in Germany at all times (Tr. p. 216).

The plaintiff and his attorney, Mr. Smith, had every opportunity to make their own investigation and examination of defendant's condition and affairs during most of a month prior to plaintiff making his investment (Tr. pp. 165-167, 50 & 68), did make inquiries and had the same information that Mr. Albertson had (Tr. 327,328, 342-343, Ex. 10).

Mr. Albertson, the Rehabilitator, testified that he believed everything he told plaintiff to be true, that he never since learned of anything told to plaintiff that was untrue, that he had no reason to deceive

him or to induce him to purchase defendant's stock (Tr. p. 335), and that he made no attempt whatever to and didn't deceive the plaintiff (Tr. pp. 342-344). Mr. Chapman, who plaintiff also claims made misrepresentations to him, was a Vice-President of defendant and as such was simply an employee under Mr. Albertson during rehabilitation. The court rehabilitation order divested him of all authority on behalf of the defendant and he had no authority from Mr. Albertson to make any representations to plaintiff (Tr. pp. 344-345). According to Mr. Albertson, plaintiff's investment was prompted by Mr. Albertson's matter of fact representation to him that the defendant would be liquidated unless there was a minimum amount of capital in it by the end of 1956. (Tr. p. 344).

Mr. Albertson further testified that in truth the defendant's assets did equal or exceed its' liabilities as of December 31st, 1956, and that a net operating profit was made for that year, which facts are reflected by the financial statement (Tr. pp. 334-335, Ex. 37). Admittedly, in insurance accounting, there are, as of any one time, a number of items which can only be carefully estimated, and the accuracy of which cannot be known until a couple of months later. For that reason, it is impossible to make an absolute representation as to the present financial condition of such a company (Tr. pp. 329-331). That fact was known to plaintiff (Tr. pp. 223-224). The plaintiff was unable to show by his testimony that the defendant's assets weren't equal to its' liabilities on December 31st, 1956, as he alleged (Tr. pp. 217-222).

The plaintiff, better than anyone, should have

known about the accuracy of some important items in the financial report, for it later developed that it was his own German agency business that occasioned substantial losses for the defendant in 1956 (Tr. pp. 224-225, Ex. 20). Plaintiff's agency business never was profitable for defendant and from January, 1957, to the termination of the relationship in 1959, it caused losses of more than $100,000.00 for defendant (Tr. p. 359).

Mr. Albertson testified that he never agreed to any of the conditions advanced by plaintiff for putting his money in because as Rehabilitator, he was not in any position to do so and was not involved in the sale of defendant's stock—that was the responsibility of the owners and managers of defendant and the Rehabilitator only approved or disapproved of their actions (Tr. pp. 342 & 344).

As for the matter of "green cards and excess limits", the evidence discloses that the plaintiff had "green card" facilities at nearly all times (Tr. pp. 239-240, 314, 373) that the defendant's management made diligent efforts to obtain the cards through another source in order to please plaintiff, but that the furnishing of both cards and excess limits were not within the control of defendant for it had to rely on some reinsurer to provide the same (Tr. pp. 138-140, 238, Ex. 38). Plaintiff as President of defendant, carried on his own negotiations for a change in "card" arrangement (Tr. p. 239).

Plaintiff now contends that his rights were greatly violated because the stock remaining unsold on March 15th, 1957, was later sold by the original stockholders of defendant to the Becker Group rather than

returned to the defendant and cancelled. The facts of the matter are that the plaintiff, who was President of defendant and charged with its' welfare, knew that as of March 16, 1957, the defendant required a substantial amount of additional financing if it was ever to continue operating, let alone get out from under the rehabilitation proceedings (Ex. 21), that the Becker Group was negotiating in good faith to purchase all of the unsold and remaining stock from the old stockholders (Tr. p. 243, Ex. 22) and in fact plaintiff had been soliciting and encouraging the Becker Group for weeks past (Tr. pp. 240-241).

Plaintiff had full knowledge of the proposed purchase by the Becker Group when he executed the stock certificate for himself and others who had purchased through the trustee, and was relying upon such refinancing (Ex. 23). Plaintiff even sent a telegram to Mr. Becker on April 7, 1957 (Ex. 25) stating that he had no objections to his Group buying the remaining 38,000.00 shares and that they need expect no trouble from plaintiff if other stockholders in favor—which all others were (Tr. pp. 243-244). Like all the other existing stockholders, he signed a consent and waiver, but for some unknown reason it was never delivered to the defendant (Tr. p. 244). Pursuant to such indicated approval an option was taken on all of said stock by the Becker Group on March 27, 1957 under which the purchase was conditioned on sufficient approval by the defendant's stockholders and of the state court at a hearing terminating the rehabilitation (Ex. 24).

At a special meeting of defendant's stockholders held on April 15, 1957, of which plaintiff was given

due notice, the stockholders present unanimously approved said sale (P. T. O. p. 26). The plaintiff's stock was not voted thereat. He testified that he wouldn't have objected thereto (Tr. pp. 95-97).

The defendant submits that even if said stock had been cancelled as plaintiff claims it should have been, it would have become either treasury or unissed stock of the defendant, in which case it was subject to issuance or sale by the management of the defendant for necessary financing purposes just as was done. There was certainly no commitment made by or on behalf of the defendant that its' Board of Directors would no longer have any authority to take such action as it considered necessary for the best interests of the defendant.

Pursuant to said stock option agreement and the stockholder approval, the Rehabilitator filed a petition with the state court for a final hearing relative to termination of the rehabilitation proceedings and approving the actions of the deputy rehabilitator, Mr. Albertson, with respect thereto, and the hearing thereon was fixed for May 28, 1957, of which due notice was received by the plaintiff (P. T. O. Tr. p.. 244, pp. 26 & 27). Despite the fact that the plaintiff had been making charges of fraud against the Rehabilitator since about aMrch 1, 1957, or sooner and had knowledge since about February 1, 1957, that his money had been taken into the defendant, he never at any time informed the Becker Group prior to said Group's large investment in the defendant in May of his fraud claims against the defendant (Tr. pp. 250-251).

The plaintiff did not intervene in any manner

whatever in said court proceeding to terminate the rehabilitation of defendant and was not present at the final hearing (Tr. pp. 245-246, Ex. 65). Prior thereto, however, the plaintiff had engaged an attorney to look into the matter of the alleged fraudulent stock sale to the Becker Group (Tr. pp. 244-245).

There being no objections made by any person whatever, to the proposed termination of rehabilitation proceedings (Tr. p. 349) and the state court finding that the defendant, upon the investment of the Becker Group, would have adequate and unimpaired capital and surplus, entered its' decree on May 28, 1957, terminating the rehabilitation proceedings (Ex. 65). On that same day the Becker Group invested approximately $300,000.00 in defendant's stock, all of which amount went into defendant's treasury (Tr. pp. 351, 372, Ex. 24). The Rehabilitator wouldn't have recommended that the defendant be discharged without the investments of plaintiff, the Becker Group and the other subscribers (Tr. pp. 246 & 350). By the same order, the court approved all actions of the Rehabilitator during the proceedings (Tr. p. 349, Ex. 65).

The plaintiff testified that he was willing to retain his stock in defendant and go along with the Becker management of defendant (Tr. p. 349, 252), later he wanted the Becker Group to buy him out (Tr. pp. 246-247), and then he made his first demand upon defendant in August 1958, to return his investment (Tr. p. 252). Plaintiff voted his stock at a special stockholder's meeting of defendant in November, 1957 (Tr. p. 253). In late 1957, and before the plaintiff made any demands for return of his money, the

Becker Group invested an additional $250,000.00 in the defendant, for which they took contribution certificates (Tr. pp. 129-130, 251, 253, Ex. 34).

The relationship between defendant and plaintiff's agency company was continued until June, 1959, when it was terminated by plaintiff's agency (Tr. 137 & 142), after many threats of a law suit by plaintiff (Tr. p. 360).

There are no allegations in this case, nor could there be any, that any of the investors who invested in the rehabilitation of this defendant company, in the amount of approximately $750,000.00, were anything but completely innocent investors. Indeed the plaintiff, who took on the role of President and Chairman of the Board of defendant, and thereby had a duty to investigate and know the condition of defendant is perhaps the least innocent of any of these various investors. Even after he had made some claims of being defrauded, he signed his own stock certificate and those of other members of his group, which other members invested about one hundred thousand dollars.

The broad picture of this lawsuit from an equity standpoint, is the picture of one person who invested $50,000.00 of a group of people who invested about $750,000.00, asking to get his whole investment returned to him at the expense of numerous other completely innocent investors, some of whom relied to some extent on him in making their investment, and which person, without any objection, allowed the court to enter an order approving the acts of the Rehabilitator.

Under all the facts and circumstances, the trial court decided that if there was any fraud or wrongdoing, the plaintiff was a party to it (Tr. pp. 381 & 383).

The trial court's findings, supported by substantial evidence, and not appearing to be plainly erroneous, must stand on appeal.

Wight v. Chandler, (CCA Wyo.) 264 F. 2d. 249.
Arn v. Dunnett (CCA Okla.). 93 F. 2d. 634, Cert. den 58S. Ct. 1046; 304 U. S. 577, 82 L. Ed. 1540.

Findings of fact by trial judge on conflicting evidence are entitled to great weight.

Nenkom v. North Butte Min. Co. (CCA Mont.) 84 F. 2d. 101.
Hedrick v. Perry (CCANM) 102 F. 2d. 802.

Findings of fact made in an equity case are presumptively correct and will not be disturbed unless a serious mistake has been made in consideration of the evidence.

Hedrick v. Perry, (CCANM) 102 F. 2d. 802.
Chisholm v. House, (CCA Okla.) 183 F. 2d. 698.
Ruth v. Climax Molybdenum Co. (CCA Colo.) 93 F. 2d. 699.

III.

Plaintiff is barred from bringing his action in fraud against the company arising out of the alleged misrepresentations of Mr. Albertson and Mr. Chapman, since these acts and things were done as part of, in fact the actual heart of, the rehabilitation proceeding. The specific acts and things done were approved by the Idaho District Court in its' order terminating

the rehabilitation. Plaintiff had notice of hearing on this matter, he had employed counsel to represent his interests, made no objection at the time of the entry of the order, has made no attempt to reopen the proceedings nor to ask the Idaho District Court to reconsider its' decision, has taken no appeal, and the order is final. It is difficult to imagine a more clear case of a collateral attack on the judgment of a State court. It is not only hornbook law that this cannot be done, but the only authorities bearing on the validity of orders in rehabilitation are unanimous in holding that the judgment cannot thus be collaterally attacked.

This very court in its' recent decision in the case of Liberty National Insurance Co. v. Reinsurance Agency, Inc., (C. C. A. Ida.)) 307 F. 2d. 164, concerning this selfsame rehabilitation proceeding, held that said judgment of the state court approving the actions of the state appointed rehabilitator, who had cancelled an agency contract between the parties, was binding upon the parties and that the Reinsurance Agnecy, Inc. had no right to question the validity of such cancellation in the federal court.

This court said therein:

> "The Idaho State Court's authority respecting the subject of this litigation including the question whether or not the commission contract of September 1, 1955 should be cancelled is prior and paramount to this Court's authority touching the same subject. Hutchins v. Pac. Mut. Life Ins. Co., 9 Cir., 97 F. 2d. 58, 60, and cases there cited."

> "To determine in the present action appellee's re-

quested relief based on its repudiation of the State Court's approval of cancellation of the September 1, 1955 contract is re-decide in a federal court not appellee to the State Court what was previously decided by the Idaho State Court

when it had unquestioned jurisdiction in the rehabilitation proceeding. In that proceeding on that question of cancellation, appellee was if it wished privileged to have a hearing, as expressly provided in the Idaho State Insurance Code."

"Under a well-known legal principal appellee is supposed to have known that law and to have contracted with it in mind."

"* * * * Appellee, however, did not seek a hearing in that State Court proceeding, took no court action therein, and the cancellation of the contract became final as to appellant and appellee with the approval of such cancellation by the State Court's judgment and order. Appellee, as well as appellant, if aggrieved, could and should have in that proceeding laid the foundation for proper appellate review."

IV.

The essential elements of an action for fraud and deceit are not present here. The essential elements required to sustain an action for fraud consist of an untrue representation or statement of past or existing material fact, which representation or statements made with speaker's knowledge of its' falsity or ignorance of its' truth and his intention that recipient will act thereon, recipient's ignorance of the untruth and his right to rely and reliance thereon to his damage.

Weitzel v. Jukich, 73 Ida. 301, 251 P. 2d. 542
23 Am. Jur. 773, Sec. 20.

The alleged representations that the defendant would furnish green cards, excess limits and expanded coverage to other countries could not amount to misrepresentations of fact, even if made. Such statements at best were promissory in nature and concerned matters that were not within the power or control of the persons allegedly making the promises. It is a general rule that fraud cannot be predicated upon statements which are promissory in nature when made and relate to future actions or conduct, upon the mere failure to perform a promise or upon failure to fulfill an agreement to do something at a future time or to make good subsequent conditions which have been assured, since non-performance alone has frequently been held to not even constitute evidence of fraud.

23 Am. Jur. Sec. 38, pp. 799-801.

It is true that a fraud may be predicated upon a promise made without the intention to perform, but this cannot be proved merely by proving a promise and a failure to perform.

The evidence clearly discloses that the plaintiff did not, in fact, rely on any representations made by Mr. Albertson or Mr. Chapman, whether true or false, that any representations they may have made as to defendant's financial condition were expressed and understood as nothing more than honest statements of opinion, based upon reasonable grounds and that the plaintfif wasn't induced by them to forbear inquiry as to their truth but rather was encouraged to investigate for himself and did.

It is a fundamental principal of the law of fraud, regardless of the form of relief sought, that in order to secure redress, the representee must have relied upon the statement or representation as an inducement to his action or injurious change of position. Moreover, the representation must be the proximate cause of such action or change of position, i. e., it must have been acted on in the manner contemplated by the party making it or else in some manner reasonably probable.

Nelson v. Hoff, 70 Ida. 354, 218 P. 2d. 345
23 Am. Jur., Sec. 141, p. 939, et seq.

In any fraud case, in order to secure relief, the complaining party must honestly confide in the representation or, as has been said, must reasonably believe them to be true. The law will not permit one to predicate damage upon statements which he does not believe to be true. A party has no right to rely upon alleged misrepresentations where he is aware of the falsity thereof or has reason to doubt the truth thereof.

23 Am. Jur., Sec. 146, p. 951.

A representation which is an honest expression of opinion, based upon reasonable grounds, and which is expressed and understood as nothing more than an opinion, cannot be made the basis of actionable fraud.

Barron v. Koenig, 80 Ida. 28, 324 P. 2d. 388.

V.

The evidence shows, that even though the plain-

tiff admits to receiving knowledge on or about February 1, 1957, that his money had been turned over to the defendant, which fact he claims to be a fraud upon him, he thereafter, without voicing any such claim, continued as President and a director of defendant, issued the stock certificates to himself and others, continued his agency at the expense of defendant, solicited the large investment of funds by the Becker Group, failed to intervene in the state court hearing ending the rehabilitation and voted his stock, among other things. Plaintiff has by such action and conduct waived any right he may have had to sue for damages or rescind.

The principle is well settled that a person defrauded in a transaction may, by conduct inconsistent with an intention to sue for damages for fraud, waive the right to sue. Likewise, one who, uninfluenced by the fraud, deals with the property as his own after having fully discovered that fraud has been practiced upon him in the contract or transaction by or through which he acquired the property, thereby waives his right to rescind.

24 Am. Jur. Sec. 209-210, pp. 34-37.

VI.

It is a general rule of law that if a party intends to rescind a contract, he must return the consideration received therefor and put the parties back in their former position as nearly as possible. During the period from January, 1957, when plaintiff made his investment, to the time the agency contract was terminated, defendant lost over twice the amount of money that plaintiff is now suing for on account of

plaintiff's agency business in Germany, which business the defendant would have discontinued except for plaintiff's purchase of defendant's stock. The defendant can only be returned to the status quo by the payment of a substantial amount of money to it.

> A party seeking to rescind a stock subscription for fraud of the corporation's agents, must rescind it as a whole and if he has received anything under it, he must return what he has received or offer to return it.
>
> Gordon v. Ralston, (Ore.) 62 P. 2d. 1328.

ARGUMENT ON CROSS-APPEAL

I.

The corporate entity in this case should be disregarded. There have been too many cases and too many articles and treaties written on this subject to cover them all. The subject in general is covered in 1 Fletcher Cyclopedia of Corporations, Sec. 41, p. 134 et seq. Fletcher states the general rule that "Notwithstanding the lack of agreement on these points, practically all authorities agree that under some circumstances in a particular case, the corporation may be disregarded as an intermediate between the ultimate person or persons or corporation and the adverse party; and should be disregarded in the interest of justice in such cases as fraud, contravention of law or contract, public wrong, or to work out the equities among members of the corporation internally and involving no rights of the public or third persons. There is a growing tendency of courts to do so." 1 Fletcher Cyclopedia Corporations 134. "Another rule is that, when the corporation is the mere

alter ego, or business conduit of a person, it may be disregarded." 1 Fletcher Cyclopedia Corporations,

Idaho recognizes this rule. *See Metz v. Hawkins,* 64 Idaho, 386, 133 P. 2d. 721. In this case the defendant looked to the plaintiff as an individual to carry on its business in Germany. He was its agent, although he operated technically through a corporate setup. He was the one who was originally bonded and not the corporation. The doctrine is particularly applicable where the subject matter in controversy involves the corporation as well as the individual. In this case the plaintiff put up the money primarily for the purpose of saving the business of the corporation. In fact, he put up the money from the funds belonging to the corporation and he was thus, in fact, acting for the corporation when he made the investment and not acting for himself personally. He took advantage of his control over the corporation to accumulate $50,000.00 or more in premiums due to provide himself with an offset on his personal claim against the company. He went through the formality of attaching these funds, but never carried through to the point of answering the writ of attachment, although it was long past due. He and he alone had been responsible for the corporation failing and refusing to make an accounting for the premiums that have been collected, until the time the pre-trial order was entered herein when the plaintiff acknowledged that the Transatlantic Company was indebted to defendant in the amount of $49,297.58 for unremitted premiums. These premiums were collected on behalf of the Liberty National Insurance Company and under the agency agreement were the absolute property of the defendant. He was responsible for converting

these funds to his own use. For him to hide behind the separate entity of the corporation under such circumstances would, in fact, permit and aid and abet the misappropriation of the funds of the Liberty National Insurance Company.

It appears that in this case there should be no question in anyone's mind that Mr. Lange was the responsible agent for the Liberty National Insurance Company to see that the money that was collected in Germany as funds of the Liberty National Insurance Company were not diverted to some other channel.

The facts and circumstances of this case make applicable the rule announced by the Idaho Supreme Court in the case of Metz v. Hawkins, supra, wherein it held:

> A corporate entity may be disregarded when it is shown that there is such a unity of interest and ownership that individuality of corporation and stockholders, officers or directors has ceased, and that observance of the fiction of separate existence would sanction a fraud or promote an injustice.

CONCLUSION

This defendant submits that the judgment of the trial court in determining that the plaintiff is not entitled on any legal or equitable ground whatever to rescind his stock subscription and that his action must be dismissed is amply supported by substantial and convincing evidence and that therefore the same must be sustained by this appellate court. Additionally, said decision is entitled to be sustained on the basis of any or all of the affirmative defenses pre-

sented, and, in particular on the res adjudicata principle adhered to by this court in connection with this very rehabilitation proceeding in its very recent decision in Liberty National Insurance Co. v. Reinsurance Agency, Inc. (C. C. A. Ida.) 307 F. 2d. 164.

The defendant further submits, however, that equity demands that the defendant recover from the plaintiff, as the alter ego of Transatlantic Casualty Underwriters, Inc., the admittedly withheld premium monies in the amount of $49,297.58, the same being by the agency agreement the absolute property of the defendant and tanamount to trust funds in the hands of plaintiff's said agency company. Any demands of Transatlantic Company thereagainst can be and should now be the subject of an independent action for that purpose, and should not preclude ultimate and complete justice between these parties on the issues presented herein.

IT IS, THEREFORE, RESPECTFULLY SUBMITTED, that the considered judgment of the lower court be sustained in favor of this defendant on the claim of the plaintiff and that it be reversed to favor the claim of this defendant against the plaintiff.

Respectfully submitted,

McNAUGHTON & SANDERSON.

By: .....

A Member of the Firm
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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance therewith.

One of the Attorneys for Appellee and Cross-Appellant.

Service of the above and foregoing Brief of Appellee is hereby admitted and threec opies have been rceived by me on this.....day of February, 1963.

Attorney for Appellant.